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No. 85-1493

In the Supreme Court of the United States

October Term 1985

METROPOLITAN EDISON COMPANY,
Appellant
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee
OFFICE OF CONSUMER ADVOCATE et al.,
Intervenors

PENNSYLVANIA ELECTRIC COMPANY,
Appellant
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee
OFFICE OF CONSUMER ADVOCATE et al.,
Intervenors

On Appeal From the Supreme Court of Pennsylvania

MOTION OF APPELLEE OFFICE OF CONSUMER ADVOCATE TO DISMISS OR AFFIRM

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MOTION OF OFFICE OF CONSUMER ADVOCATE TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1, the Office of Consumer Advocate (OCA) * hereby moves that this Court dismiss this appeal of Metropolitan Edison Company and Pennsylvania Electric Company, on the ground that the appeal does not present a substantial federal question. In the alternative, the OCA moves that this Court affirm the decision of the Supreme Court of Pennsylvania rendered below.

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* The Pennsylvania Office of Consumer Advocate, a party below, is an agency of the Commonwealth of Pennsylvania authorized to represent the interests of Pennsylvania utility consumers before the Pennsylvania Public Utility Commission and other state and federal agencies and courts which regulate the activities of Pennsylvania's public utilities. Pa. Stat. Ann. tit. 71, §309-1 *et seq.* (Purdon Supp. 1985). In the present proceeding, the OCA has represented the interests of the ratepayers of Metropolitan Edison Company and Pennsylvania Electric Company from the inception of this case in 1980 and throughout the administrative and appellate process.

COUNTERSTATEMENT OF THE CASE

On March 28, 1979, an accident occurred at the Three Mile Island nuclear generating station near Harrisburg, Pennsylvania. As noted by the Pennsylvania Supreme Court in its Opinion below, the accident was "the most serious in the history of nuclear power generating facilities in the United States," and resulted in the "near melt-down" of Three Mile Island Unit 2 (TMI-2). Appellants' Appendix at A2. TMI-2, which had entered commercial service just a few months prior to the accident, was severely damaged and remains out of service indefinitely at this time.

At the time of the accident at TMI-2, another reactor at Three Mile Island, TMI-1, had been shut down for refueling. TMI-1 had been in service since 1974, but following the accident, the Nuclear Regulatory Commission directed that TMI-1 remain out of operation until certain safety concerns regarding the restart of that reactor were fully resolved by that agency.

The present case arises from the ratemaking treatment accorded by the Pennsylvania Public Utility Commission (PUC or Commission) to the investment in Three Mile Island of two Pennsylvania utilities, Metropolitan Edison Company (Met-Ed) and Pennsylvania Electric Company (Penelec). Specifically at issue is the PUC's decision in 1981 which refused to allow Met-Ed and Penelec to charge their ratepayers a current return on their investment in TMI-1 while that unit remained out of service.*

* Met-Ed owns 50 percent of TMI 1 and 2, while Penelec owns 25 percent of both units. The remaining 25 percent is

It should be noted that the PUC did not remove the costs of TMI-1 from rates immediately after the accident at TMI-2. The costs of TMI-1 had been reflected in the rates of Met-Ed and Penelec for several years prior to the accident. In an Order dated June 15, 1979, the PUC removed the costs of the clearly useless TMI-2 from rates but allowed the utilities to continue to charge ratepayers for all costs associated with TMI-1. *Pa. PUC v. Metropolitan Edison Co.*, 29 PUR 4th 502 (1979). The basis for the PUC's ruling on TMI-1 was that:

> At this time it appears reasonably certain that TMI-1 will return to service. Witness Herman Dieckamp, president of GPU, testified that resumption of generation at TMI-1 could occur as early as August, 1979, and certainly no later than January 1, 1980.

Id. at 507.

Despite Mr. Dieckamp's certainty, however, January 1, 1980, came and went, but TMI-1 remained out of service. In fact, as noted by Appellants at page 8 of their Jurisdictional Statement, TMI-1 did not resume operation until October 3, 1985.

The full costs of TMI-1 continued to be reflected in the rates of Met-Ed and Penelec until May, 1980, at which time the Commission set temporary rates excluding certain TMI-1 costs due to the continued uncertainty of the return of that unit to utility service. The May, 1980 decision was

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owned by Jersey Central Power and Light Company (Jersey Central), which is located in New Jersey. All three of these utilities are subsidiaries of General Public Utilities Company (GPU), a public utility holding company registered under the Public Utility Holding Company Act of 1935.

reached after the plant had already been totally out of service for more than a year—a period during which ratepayers of Met-Ed and Penelec not only bore all the base rates costs of TMI-1, but also the costs of generating or purchasing higher cost replacement power to make up for the massive amounts of generation lost at both TMI units.

On July 29, 1980, Met-Ed and Penelec filed the rate increase requests which are the subject of the present appeal. Met-Ed requested a rate increase of $76.5 million, while Penelec requested $67.4 million. Both utilities sought to include the costs of TMI-1 in rates as part of their request. By Order entered April 9, 1981, as reaffirmed by an Order on Reconsideration on July 27, 1981, the PUC refused to grant the utilities' requests to charge ratepayers a return on the still inactive TMI Unit 1. Nevertheless, the PUC granted Met-Ed and Penelec rate increases of $51.8 million and $55.4 million respectively.

In denying the utilities a return on TMI-1, the PUC relied on the longstanding principle of Pennsylvania public utility law that ratepayers may only be required to pay a return on utility property which is "used and useful" in providing utility service. This principle is not peculiar to Pennsylvania law. Rather, as recently noted by Judge Starr in an Opinion of the United States Court of Appeals for the District of Columbia:

> For nearly a century the "used and useful" principle, enunciated by the Supreme Court in *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898), has stood as a bedrock principle of utility rate regulation. The principle is simple—it requires that costs associated with electric power plants be paid by the ratepayers who benefit from the plant.

Kentucky Utilities Co. v. FERC, 760 F.2d 1321, 1324 n. 4 (D.C. Cir. 1985).

Though removing certain costs of TMI-1 from rates, the PUC ordered a number of other adjustments which had the effect of increasing Met-Ed's and Penelec's rates substantially over their prior levels. First, the Commission allowed the Companies to charge rates which included two of the highest rates of return on equity that had ever been permitted for Pennsylvania public utilities at that time—a 17 percent return for Met-Ed and a 16.5 percent return for Penelec. Second, the PUC permitted Met-Ed and Penelec to set their rates to exclude certain reserve capacity credits which, if recognized, would have reduced the rates of Met-Ed and Penelec by $23.1 million and $11.4 million respectively.* Third, the PUC did not remove *all* the costs of TMI-1 from rates, but instead allowed $11 million of TMI-1 related expenses for Met-Ed and $5.4 million for Penelec. Fourth, the PUC permitted the utilities to cease accruing depreciation for TMI-1 on their books. This had the effect of holding the value of TMI-1 constant so as to permit the full future recovery of the remaining TMI-1 investment

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* Reserve capacity credits are charges which Met-Ed and Penelec would either receive or pay under the regional Pennsylvania-New Jersey-Maryland (PJM) power pool agreement. In the rate decision under appeal here, the Commission allowed Met-Ed and Penelec to set rates on the basis of a "normalized" level of reserve capacity expenses which were $23.1 million and $11.4 million higher than the amounts which actually were incurred during the time period examined for the setting of rates. As stated by the Commonwealth Court, by normalizing these expense credits, the Commission "allowed, in effect, an interest-free loan by customers to the utilities." Appellants' Appendix at A-13.

from ratepayers when and if the plant returned to service. Finally, the PUC permitted the utilities to continue to charge ratepayers the full cost of replacement power for TMI-1, a cost which, in fact, exceeded the economic "benefit" which ratepayers received by having the return on TMI-1 removed from base rates.

Met-Ed and Penelec sought review of the Commission Orders in the Pennsylvania Commonwealth Court. That Court affirmed the PUC Orders, holding that "the Commission's exclusion of capital costs and operating expenses of TMI-1 was proper" and that the PUC Orders "properly balanced investor and consumer interests." Appellants' Appendix at A20, A22.

Met-Ed and Penelec then sought review of the Commonwealth Court Order in the Pennsylvania Supreme Court. On December 9, 1985, the Supreme Court affirmed the Commonwealth Court Order. Specifically, the Court upheld the denial of a return on TMI-1 as a proper application of the used and useful principle and rejected the utilities' arguments that the application of that principle in this case violated constitutionally protected investor interests which the Appellants alleged were established in the United States Supreme Court decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Before addressing the Appellants' substantive arguments here, one other factual circumstance should be noted. That is, while the above-noted proceedings were making their way through the Pennsylvania regulatory and appellate process, a parallel proceeding was occurring at a somewhat quicker pace in New Jersey with respect to the TMI-1 investment of Jersey Central. In New Jersey, as in Pennsylvania, the governing regulatory agency and appel-

late court found that TMI-1 was properly excluded from rates under the long-established used and useful principle. The New Jersey court also rejected the utility's argument that the New Jersey Board of Public Utilities had violated the rights of Jersey Central's investors as set forth in the *Hope* case.

On March 5, 1984, Jersey Central appealed that decision to the United States Supreme Court on the basis of virtually the same facts and the same allegedly constitutional issues raised in Met-Ed and Penelec's Jurisdictional Statement in the present case. *Jersey Central Power & Light Co. v. Board of Public Utilities,* October Term 1983, No. 83-1478. On April 23, 1984, this Court dismissed Jersey Central's appeal for want of a substantial federal question. *Jersey Central Power & Light Co. v. Board of Public Utilities,* 466 U.S. 947 (1984).

Appellants Met-Ed and Penelec filed the Jurisdictional Statement in the present case on March 7, 1986. The Office of Consumer Advocate, a party to the case below, received the Appellants' Jurisdictional Statement on March 10, 1986, and is filing this Motion on behalf of Met-Ed and Penelec ratepayers to dismiss the appeal or, in the alternative, to affirm the decision of the Pennsylvania Supreme Court below.

ARGUMENT

I. The Precise Issue in This Case, Involving the Same Electric Generating Plant and the Same Legal Argument, Was Recently Dismissed by This Court for Want of a Substantial Federal Question

As noted in the above Counterstatement of the Case, the Appellants in this proceeding own only 75 percent of the Three Mile Island Unit 1 nuclear plant, which is the source of the Pennsylvania public utility ratemaking dispute at issue here.

The remaining 25 percent of TMI-1 is owned by the Jersey Central Power and Light Company (Jersey Central), the New Jersey-based utility which, along with Met-Ed and Penelec, comprise the three operating subsidiaries of the General Public Utilities Company (GPU), a public utility holding company.

In New Jersey, as in Pennsylvania, the utility was unsuccessful in convincing the governing regulatory agency to permit the company to continue charging ratepayers for the dormant TMI-1 nuclear power plant. Jersey Central was also unsuccessful in persuading the New Jersey appellate courts that the agency's treatment of its rate request violated certain constitutionally protected investor rights which were purportedly set forth by the United States Supreme Court in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Jersey Central did not stop its quest for rate relief at the state court level, however. Rather, in an appeal docketed by this Court at No. 83-1478, the utility sought to have the New Jersey court decision overturned by the United States Supreme Court. *Jersey Central Power & Light Co. v. Board of Public Utilities,* October Term 1983, No. 83-1478. In its Jurisdictional Statement filed with this Honorable Court on March 5, 1984, Jersey Central presented the following questions:

> 1. Was the Court below correct in holding that the three investor-interest components of the criteria for determining whether electric utility rates are "just and reasonable" as specified by this Court in *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy such investor-interest criteria would not exploit customers?
>
> 2. Are ratemaking determinations which fail to assess their consequences to customers and investors violative of the due process requirements of the Fifth and Fourteenth amendments by reason of being arbitrary and capricious and preclusive of meaningful judicial review?

Jurisdictional Statement in *Jersey Central Power & Light Co. v. Board of Public Utilities,* October Term 1983, No. 83-1478, p. i.

Motions to dismiss Jersey Central's appeal or, in the alternative, affirm the the opinion of the New Jersey court below, were filed by the New Jersey Board of Public Utili-

ties and the Department of the Public Advocate (the counterparts of the PUC and OCA in the present proceeding).

On April 23, 1984, this Honorable Court dismissed the appeal of Jersey Central for want of a substantial question. *Jersey Central Power & Light Co. v. Board of Public Utilities,* 466 U.S. 947 (1984).

In the present proceeding, Jersey Central's Pennsylvania sister utilities, Met-Ed and Penelec, have presented the following question:

> Was the Court below correct in holding that the investor-interest components of the criteria for determining whether electric utility rates are "just and reasonable", as specified by this Court, in *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591, 603 (1944) and its progeny, are not of "constitutional dimension"?

Jurisdictional Statement at i.

The question presented in this appeal by GPU's Pennsylvania subsidiaries is nearly identical to the first question presented in the appeal brought by GPU's New Jersey subsidiary which was already dismissed by this Court. Further, the OCA submits that a review of the factual background and legal arguments raised by the Appellants in these two Jurisdictional Statements reveals that these cases are practically indistinguishable. The present appeal therefore simply represents a second attempt by essentially the same party to present the same issue which this Court already has found does not raise a substantial federal question.

As in the case of the virtually identical appeal of Jersey Central, the present appeal raises no substantial

federal question. In light of this Court's dismissal of the prior appeal of Jersey Central, as well as for the reasons set forth below, the OCA respectfully submits that the present appeal should be summarily dismissed as well.

II. The Appellants' Constitutional Challenge to the Pennsylvania Supreme Court Order Is Wholly Without Merit

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A. The Appellants' argument is not supported by the decision of this Court in FPC v. Hope Natural Gas.

The Appellants' entire argument before this Court rests on a complete misreading of Justice Douglas' opinion for the Court in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

In discussing the proper balancing of investor and ratepayer interests under the Natural Gas Act, the *Hope* opinion recognized the investor's "legitimate concern with the financial integrity of the company." 320 U.S. at 603. The Court *prefaced* that remark, however, by quoting the statement in its earlier opinion in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942), that "regulation does not insure that the business shall produce net revenues." 320 U.S. at 603. Because the appeal in *Hope* concerned only whether the *investor* interests had been adequately considered, and because the Court concluded that the "end result" in that case could not be condemned "as unjust and unreasonable *from the investor or company viewpoint*," *id.* (emphasis added), it was not necessary for the Court to set forth in detail the countervailing ratepayer interests which also must be considered. The Court thus noted that

"[t]he conditions under which more or less might be allowed are not important here." *Id.*

Thus, in writing for the Court in *Hope*, Justice Douglas recognized that:

> *From the investor or company point of view* it is *important* that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.

Id. (Emphasis added.)

What is "important" to investors is not necessarily mandated by the Constitution, however, as evidenced by the language both before and after the enumeration of investor interests in the *Hope* opinion cited above.

The Court in *Hope* did not rule that the satisfaction of the investor interests enumerated therein was either statutorily or constitutionally mandated. Rather, the Court recognized that regulation might not result in any net revenues whatsoever. The Court also recognized that, while investor interests were certainly satisfied in that case, there might be conditions under which "more or less might be allowed." Because the "end result" in the *Hope* case clearly met the investors' needs, the Court held that those investors could not complain on appeal with respect to the particular ratemaking methodology which had been used by the Federal Power Commission in reaching that result. As stated by Justice Douglas:

> If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.

FPC v. Hope Natural Gas Co., 320 U.S. at 602.

The decision in *Hope* thus put an end to an era of judicial intervention in ratemaking decisions in which the courts, including the lower Court in the *Hope* case, had ruled that, as a matter of constitutional right, the "fair value" of the property on which a utility's rates were set had to include some measure of present value or reproduction cost, rather than be based upon the original or historical cost of the property.

The Court thus essentially adopted the view of the concurring opinion of Justice Douglas (the author of the *Hope* opinion), Justice Black and Justice Murphy in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 607 (1942), that:

> Irrespective of what the return may be on "fair value," if the rate permits the company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end *so far as the investor interest is concerned.*

(Emphasis added.)

In that concurrence, Justices Douglas, Black, and Murphy specifically cited the "havoc raised by insistence on reproduction cost" and noted that "the 'fair value' rule has proved to be unworkable by reason of the time required to make the valuations, the heavy expense involved, and the unreliability of the results obtained." 315 U.S. at 605. (Footnote omitted.)

The thrust of the *Hope Natural Gas* decision, therefore, was to limit the role of the courts in examining the minutiae of regulatory rate decisions and, particularly, to insure that the courts remained out of the business of de-

termining how the value of utility property in rate base must be calculated.

That the *Hope* decision was intended to serve as a basis for judicial restraint in the review of expert ratemaking decisions and *not* as a source of newly created constitutional rights for utility investors was made abundantly clear in a unanimous Supreme Court Opinion issued in 1945, just one year after the *Hope* case was decided. *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548 (1945).

In *Market Street Railway*, a financially distressed street railway company argued that the rate it had been granted was "confiscatory by the tests of *Federal Power Commission v. Hope Natural Gas Co.*," because it did not insure the financial integrity of the enterprise. *Id.* at 566. In the Opinion by Justice Jackson, the Court responded:

> It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business make a profit. 320 U.S. at 603; see *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590. *All that was held* was that a company could not complain if the return which was allowed made it possible for the company to operate successfully. There was no suggestion that less might not be allowed when the amount allowed was all that the company could earn.

Id. (Emphasis added.)

The Court in *Market Street Railway* thus confirmed that *Hope* did not alter the longstanding principles established in the 1896 Opinion of the senior Justice Harlin in

Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896). There the Court had stated:

> It cannot be said that a corporation is entitled, as of right, and without reference to the interest of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. *The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends.*

Id. at 596. (Emphasis added.)

This principle was subsequently reaffirmed by the junior Justice Harlan, writing for the Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). There, after reiterating the investor interests identified in *Hope*, the Court noted that, while these criteria "remain pertinent," they "scarcely exhaust the relevant considerations." *Id.* at 791. Rather, Justice Harlan wrote:

> The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they "maintain credit . . . and . . . attract capital."

Id. (Footnote omitted.)

As will be set forth more fully in the next section of this argument, the OCA submits that one of the other "relevant considerations" in setting just and reasonable rates is the need to protect ratepayers from being forced to pay not only for the cost of providing them with utility service, but also to pay a return on property which is owned by a utility but which is not used and useful in providing utility service. That is, while investors have an interest in the financial well-being of the utility company, the extent to which that interest must be satisfied by *ratepayers* is equal only to the extent to which the investments provide utility service to those ratepayers.

The OCA submits that none of the cases cited by the Appellants directly support their contention that the satisfaction of the investor interests set forth in *Hope* is constitutionally mandated.* Rather, as stated by the Pennsyl-

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* Appellants characterize a recently vacated panel opinion of the United States Court of Appeals for the District of Columbia as "essentially adopting the views here expressed." Jurisdictional Statement at 12; *Jersey Central Power & Light Co. v. FERC*,

vania Supreme Court in the Opinion below, the investor interests enumerated in *Hope* are "among the factors to be taken into account in the balancing of interests process," but are not "of constitutional dimension." Appellants' Appendix at A11.

Appellants may only succeed in this appeal if they can demonstrate that the Pennsylvania Supreme Court decision —which, as will be shown below, was clearly correct as a matter of Pennsylvania public utility law—violated their federal constitutionally protected rights. The Appellants' only argument that such a violation occurred is based on a strained interpretation of this Court's *Hope* decision which was flatly and unanimously rejected by this Court in the *Market Street Railway* case just one year after the *Hope* decision was rendered.

It is untenable to suggest that the principles of judicial restraint set forth by Justice Douglas in *Hope* were intended to provide a federal constitutionally guaranteed

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768 F.2d 1500 (D.C. Cir. 1985), *vacated for rehearing en banc*, 776 F.2d 364 (D.C. Cir. 1985). With respect to this decision, the OCA would note first that it has been vacated and is, therefore, of no precedential significance. Second, the OCA would point out that the utility in that case—Jersey Central—alleged that it had been denied a hearing by the Federal Energy Regulatory Commission (FERC) on the issue of whether FERC's Order denying a return on the abandoned Forked River generating plant violated the "end result" test set forth in the *Hope* opinion. The Panel majority found that Jersey Central should be granted a "full evidentiary hearing" on the matter and would have remanded the case to FERC. 768 F.2d at 1501. *See also*, concurring opinion of Judge Ginsburg, 768 F.2d at 1505. By contrast, in the present case, there is no question that Met-Ed and Penelec were given a full hearing and were accorded the full panoply of due process rights. *See* Jurisdictional Statement at 9-10.

right of public utility investors to override longstanding principles of state public utility law, whenever the application of those principles places the financial interest of investors in jeopardy. If, as noted in the *Hope* decision, "regulation does not insure that the business shall produce net revenues," 320 U.S. at 603 *(quoting FPC v. Natural Gas Pipeline,* 315 U.S. at 590), it is difficult at best to see how Met-Ed and Penelec can have a *constitutional* right to the particular level of net revenues that it has demanded in this case. The *Hope* decision does not mandate such a result and the Pennsylvania Supreme Court was correct in rejecting that view.

B. The Pennsylvania Supreme Court's reliance on the "used and useful" principle was a proper application of State Public Utility Law and was not violative of the utilities' constitutional rights.

As in each of the numerous rate cases that come before the Pennsylvania Public Utility Commission each year, the ultimate issue faced by the Commission in the case below was: what level of rates would be "just and reasonable" under the terms of the Pennsylvania Public Utility Code. 66 Pa. Cons. Stat. Ann. §1301 *et seq.* (Purdon 1979).

The ratemaking process that goes into this ultimate determination has been described by the Pennsylvania Commonwealth Court as requiring four basic determinations:

> 1. The company's *gross utility revenues* under the rate structure examined.

2. The *operating expenses* including all taxes appropriately incurred to produce gross revenues.

3. The *rate base,* which is all property which actually provides the service for which rates are charged and represents the base on which a return should be earned.

4. The *rate of return,* a percentage figure applied to the rate base which yields the return to which investors in the utility are reasonably entitled.

Bell Telephone Co. of Pennsylvania v. Pa. PUC, 47 Pa. Commonwealth Ct. 614, 618-619, 408 A.2d 917, 920-21 (1979). (Emphasis in original.)

In the present case, the primary controversy concerned the "rate base" component of rates and specifically whether the utilities' investment in the dormant TMI-1 nuclear plant should be included in the rate base on which a return should be allowed.

In making and reviewing that determination, the PUC, Commonwealth Court and Pennsylvania Supreme Court each placed primary reliance on the long-established principle of public utility law that a utility is only entitled to earn a return on property which is "used and useful" in the public service.

As noted in the above Counterstatement of the Case, the used and useful principle is not peculiar to Pennsylvania law. Rather, the principle has been applied by state and federal regulatory agencies throughout the Nation and, as recently stated by the United States Court of Appeals for the District of Columbia, "has stood as a bedrock principle of utility rate regulation" for "nearly a century." *Ken-*

tucky Utilities Co. v. FERC, 760 F.2d 1321, 1324 n. 4 (D.C. Cir. 1985).

The used and useful principle, though not the phrase itself, is generally traced back to this Court's Opinion in *Smyth v. Ames*, 169 U.S. 466 (1898). There, Justice Harlan wrote:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.

Id. at 546.

The constitutional underpinnings of the used and useful principle were subsequently set forth most clearly in *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938), where this Court stated:

> As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. *But it is not entitled to have included any property not used and useful for that purpose.*

(Citations omitted; emphasis added.)

This fundamental holding of the *Denver Union Stock Yard* case was based on an unbroken series of Supreme Court decisions which addressed this issue, starting with *Smyth v. Ames*, supra, 169 U.S. at 546-47, and continuing through such cases as *San Diego Land and Town Co. v. National City*, 174 U.S. 739, 757-758 (1899); *San Diego*

Land and Town Co. v. Jasper, 189 U.S. 439, 446-467 (1903); *Willcox v. Consolidated Gas Co.,* 212 U.S. 19, 41 (1909); *Minnesota Rate Cases,* 230 U.S. 352, 434, 454 (1913); *Los Angeles Gas & Electric Co. v. Railroad Commission,* 289 U.S. 287, 305-06, 311, 316-317 (1933); *Columbus Gas & Fuel Co. v. Public Utility Commission,* 292 U.S. 398, 406-407 (1934), and *St. Joseph Stock Yards Co. v. United States,* 11 F. Supp. 322, 329 (W.D. Mo. 1935), *aff'd,* 298 U.S. 38 (1936).

Nor is the used and useful principle a mere relic of the past. As noted in another recent opinion of the United States Court of Appeals for the District of Columbia:

> Although methods for determining values of rate base items have evolved since *Smyth v. Ames,* the precept endures that an item may be included in a rate base only when it is "used and useful" in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them.

Natural Gas Pipeline Co. v. FERC, 765 F.2d 1155, 1157 (D.C. Cir. 1985), *cert. denied,* 106 S.Ct. 794 (1986), *quoting Tennessee Gas Pipeline Co. v. FERC,* 606 F.2d 1094, 1109 (D.C. Cir. 1979), *cert. denied,* 445 U.S. 920 and 447 U.S. 922 (1980).

The OCA submits that it is not without reason that the used and useful standard has continued to stand as a "bedrock principle" of rate regulation. Under whatever name it is given, the principle that ratepayers may only be required to pay a return on utility investment which is properly dedicated to the provision of utility service is fundamental to a rational ratemaking methodology.

Argument

Substantial discretion can and has been applied by regulatory agencies in deciding what constitutes used and useful property; how that property should be valued; and what rate of return should be allowed on such property. However, without some guiding principle to determine what investments of a utility should be included in the rate-making determination, a fair and meaningful balancing of consumer and investor interests would not be possible.

The used and useful principle permits a regulatory agency to differentiate between those investments made by a utility which serve ratepayers, and therefore are entitled to a return from those ratepayers, and investments which do not provide such service, and therefore are not the proper responsibility of ratepayers. As recognized by this Court in *Denver Union Stock Yard*, supra, investors have no right, constitutional or otherwise, to demand a return from ratepayers on investments which do not serve those ratepayers. Similarly, regulation should impose no obligation on ratepayers, who typically have no choice as to where to purchase monopoly utility services, to support investments of a utility which do not serve those ratepayers.

Contrary to the view of Appellants as set forth in their Jurisdictional Statement, the used and useful principle is not just a "catchy phrase" which has been "glibly employed" by this Court and others in deciding public utility rate cases. Jurisdictional Statement at 12 and 13. Rather, as many courts have recognized over the last 90 years, this principle represents an equitable and rational standard under which ratepayers are protected from unduly high rates while investors are assured an opportunity to earn a fair return on their investment which is utilized in providing a public service.

Moreover, there is nothing in the *Hope* decision which indicates that this Court intended the used and useful principle to be displaced by a new constitutional standard which states that utility investors must be provided with satisfactory returns on all investments whether or not those investments are utilized in the actual provision of utility service. As stated by the Pennsylvania Supreme Court in its Opinion below:

> The "used and useful" concept came into existence long before the *Hope* decision was rendered, and it is not generally regarded as having been overridden by that decision.

Appellants' Appendix at A9.

Indeed, the OCA submits that the apparently disparate themes of *Hope*—that legitimate investor interests should be considered, but that regulation does not assure a profit—can best be reconciled by recognizing that the *Hope* opinion did not, and was not intended to, overturn the fundamental principle that a utility has *no* right to demand a return from ratepayers on property which is not of service to those ratepayers. Again, the United States Supreme Court's nearly contemporaneous review of *Hope* in *Market Street Railway* is instructive.

In *Market Street Railway,* the Supreme Court upheld a six-cent fare, which allowed a failing street railway company a six percent return on a rate base of $7,950,000. 324 U.S. at 557. This rate base valuation, which was equal to the price at which the company had offered to sell its operating properties to the municipality which it served, was attacked by the utility as confiscatory, *id.* at 564, but was upheld by this Court even though the book value of the

company's property was $41,768,505 and a valuation study of the properties' "historical reproduction cost" indicated a current value of $25,343,543. *Id.* Indeed, the Company argued that the valuation of its property

> did not consider reproduction cost, historical cost, prudent investment, or capitalization bases, on any of which under conventional accounting the six-cent fare would produce *no return* on its property and would force a substantial operating deficit upon the Company.

Id. at 553-54. (Emphasis added.)

As noted above, the Court rejected the Company's contention that the rate order was "confiscatory" under the *Hope* case. Rather, Justice Jackson wrote in the Court's unanimous opinion that:

> Without analyzing rate cases in detail, it may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historic valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

Id. at 567.

The above analysis is particularly relevant here, since it was technological and economic forces which rendered Met-Ed's and Penelec's investment in the Three Mile Island units either temporarily or permanently useless. The ratemaking orders of the Pennsylvania PUC were not the cause of the utilities' financial problems, nor should they be required to be the total solution.

As discussed more fully below, the PUC, though denying a return on TMI-1, addressed the interests of investors by granting Met-Ed and Penelec a generous return on the Companies' used and useful property and making a number of other favorable ratemaking adjustments which had the effect of raising the utilities' rates substantially.

While the OCA submits that a much lower rate increase would have been quite appropriate and constitutionally defensible, there can be no question that the Appellants have no *constitutional* entitlement to even greater rate increases than the ones they received in this case.

As noted in the preceding section of this Argument, this Court found in the *Hope* case that the investor interests in the utility in question had been more than adequately satisfied and therefore the conditions "under which more or less might be allowed" were not "important" to that decision. The OCA submits that one of the conditions under which "less might be allowed," is a case such as this, where a very substantial portion of the utility's investment is not used and useful to the ratepaying public and therefore not entitled to earn a return from those ratepayers.

The application of the used and useful principle in this case was consistent with applicable state law and with the constitutional requirements set forth by this Court in

Denver Union Stock Yard Co. v. United States, 304 U.S. 470, 475 (1938). As correctly found by the Pennsylvania Supreme Court, there is nothing in *FPC v. Hope Natural Gas Co.* or any other Opinion of this Court which requires —as a matter of constitutional law—that this principle be overridden in this case.

C. The PUC and the Pennsylvania Courts adequately addressed the interests of investors in this proceeding.

At page 4 of their Jurisdictional Statement Appellants contend that:

> the PUC order was constitutionally invalid because the PUC had not balanced—and did not purport to balance—the consumer and investor interests in the manner required by *Hope* and its progeny.

The above statement, as amplified and repeated throughout the Jurisdictional Statement, misstates both the holding in the *Hope* case and the actions taken by the PUC which have enabled Met-Ed and Penelec to survive the TMI catastrophe intact.

As explained in the above Counterstatement of the Case, after the March 28, 1979, accident at Three Mile Island, the Commission addressed the Appellants' various ratemaking claims, including their requests regarding TMI-1, in a series of Orders. These Orders addressed some of the most difficult issues ever presented to the Pennsylvania Public Utility Commission—issues which, contrary to the representations of the Appellants, were not dismissed in a cavalier manner.

Thus, for example, in the May 23, 1980, Order which first removed TMI-1 costs from rates, the Commission wrote:

> The current proceedings have presented exceedingly difficult issues for this Commission to resolve. The Commission has had to balance the need to explore and carefully examine Met Ed's continuing, long-term viability against the urgency to act promptly to avoid being overtaken by events. In addition, the Commission has had to resolve the competing concerns of creditors who want assurance of earnings and ratepayers who want equity in allocating the costs associated with the Three Mile Island accident (and who see an inequitable duplication in paying the costs of TMI-1 and the costs of TMI-1 replacement power); and of Respondents who would emphasize their financial needs and other parties seeking a determination based on other economic, social and political principles.
>
> * * *
>
> The Commission will provide Met Ed the means of financial rehabilitation. However, we will write no blank checks on its ratepayers. We find that TMI-1 is no longer used and useful and that the base rates of both Met-Ed and Penelec should be reduced. This order, with its provisions for a fully current recovery of energy costs and an accelerated amortization of deferred energy costs provides an adequate framework for Met Ed's recovery. Respondent must convince its bank creditors that it has the will and the ability to rehabilitate itself.

Pa. PUC v. Metropolitan Edison Co. and Pennsylvania Electric Co., 37 PUR 4th 77, 80-81 (1980).

Similarly, in the subsequent rate case which is the subject of the present appeal, the presiding Administrative Law Judge, whose Recommended Decision was substantially adopted by the Commission, noted:

> This rate case is unique. It is unique because of TMI. It is in this context that we must resolve this rate proceeding. There are no precedents to sharply define our ratemaking responsibility under such extraordinary circumstances. We must fashion our own course. In doing so, we may find it necessary, within the discretion legally reposed in us, to depart somewhat from traditional ratemaking procedures; we must weigh and examine current procedures and policies in the light of unprecedented conditions.
>
> Met Ed, principally because of the accident at TMI-2, and the subsequent suspension of TMI-1, is in a difficult financial condition. It is that condition which permeates this rate case proceeding.
>
> It must be clearly understood that it is not our responsibility, privilege or purpose to bail out Met Ed from all its financial problems with ratepayers' money. Truly, Met Ed's financial burdens cannot be totally solved through the ratemaking process.

Pa. PUC v. Metropolitan Edison Co., No. R-80051196, ALJ Recommended Decision, Slip op. at 6 (March 20, 1981).

It was in light of the competing concerns of the utilities' investors and ratepayers in this case that the Commission ultimately granted Met-Ed $51.8 million, or 68%, of the $76.5 million rate increase it originally requested, while

granting Penelec $55.4 million, or 82%, of its $67.4 million request.

In reviewing these Commission rate orders, the Commonwealth Court rejected the utilities' contention that the Commission did not balance the interests of investors and ratepayers as follows:

> We find that the Commission did not abuse its discretion in finding that TMI-1 was not used or useful and thus in excluding its capital and operating costs from the rate bases. The actions of the Commission do reflect a balancing of investor and consumer interests as prescribed by the Supreme Court in *Pennsylvania Gas and Water Co.* The allowed increase for Penelec included $5.5 million for TMI-1 related costs and reflected a 16.5% rate of return on common equity capital. The allowed increase for Met Ed included $11 million for TMI-1 related costs and reflected a 17% rate of return on common equity capital. This is the highest rate ever allowed a Pennsylvania utility. Further, TMI-1 was out of service for a full 14 months before its capital costs and operating expenses were excluded from the companies' rate bases. Finally, the Commission normalized the reserve capacity expense credits, discussed *infra*, which allowed the reserve capacity expense to be shown in the test year as $11.4 million higher than the actual reserve capacity expense. For these reasons, we find the Commission properly balanced investor and consumer interests in excluding TMI-1 capital costs and operating expenses from the companies' rate bases.

Appellants' Appendix at A21-A22. (Footnotes omitted.)

Finally, the Pennsylvania Supreme Court affirmed the Commonwealth Court Order and specifically stated that the PUC decisions "reflect a balancing of consumer and investor interests." Appellants' Appendix at A11, note 1.

In short, it is not the refusal of the Pennsylvania Commission and courts to balance the interests of investors and ratepayers which gives rise to the present appeal. Rather, the alleged injustice lies in the failure of these bodies to "balance" these interests in the manner sought by the Appellants—i.e. by granting the utilities every dollar of ratepayer money which they requested.

As shown above, however, the Commission's refusal to accede to all of the utilities' rate demands certainly does not amount to an unconstitutional taking of the utilities' property. Nor were the Companies' constitutional rights violated in any other way. The PUC considered and carefully addressed the interests of the utilities' investors throughout this extraordinarily difficult ratemaking process. The utilities' argument that their investors' interests were not adequately considered is totally without merit.

D. The Appellants' arguments regarding the "exploitation" of ratepayers are legally incorrect and are not properly applied by the Appellants in this case.

In their Jurisdictional Statement, Appellants assert that the Pennsylvania Supreme Court "misstated" the issue before it when it characterized the utilities' argument as being that *Hope* provided investors with a guarantee of financial integrity "irrespective of countervailing consumer

interests." Jurisdictional Statement at 4-5. Appellants contend that their argument actually has been that *Hope* requires rates "which promote the financial integrity of utilities as measured in the manner directed by *Hope*, *if—but only if*—such rates would not exploit customers." *Id.* at 5. (Emphasis in the original.) Though Appellants allude to this statement of their argument several times throughout the Jurisdictional Statement, *id.* at 5, 6, 10, 16, they never define what an "exploitative" rate is, nor do they provide any authority for the position that investor interests must override established ratemaking principles until this undefined border of exploitation is crossed.

In response to this argument, it should first be noted that this interpretation of *Hope* is directly contradicted by this Court's own interpretation of *Hope* in *Market Street Railway*, supra. In that unanimous opinion issued one year after the *Hope* decision, the Court upheld a fare *reduction* from seven cents to six cents for a failing street railway company, in spite of the Company's contention that the setting of such a fare was:

> confiscatory by the tests of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 605, from which [the company] claims to be entitled to a return "sufficient to assure confidence in the financial integrity, to attract capital, and to compensate its investors for the risk assumed."

324 U.S. at 566.

Nothing in the *Market Street Railway* case suggests that the previous seven-cent fare or any other fare higher than six cents would have been deemed "exploitative" or that "but for" such a threat of exploitation, the Company's

Hope-related arguments would have been accepted. Rather, the Court simply rejected the company's totally fallacious reading of the *Hope* opinion and reiterated that: "All that was held [in *Hope*] was that a company could not complain if the return which was allowed made it possible for the company to operate successfully." *Id.*

While the Appellants in the present case never specify what would constitute an "exploitative" rate, they do state at page 10 of the Jurisdictional Statement that:

> Met-Ed and Penelec presented unchallenged evidence that, even if their requested rate increases were granted in full, their rates would be in line with those of customers of other utilities in Pennsylvania and neighboring area.

If, by this statement, Appellants mean to imply that their ratepayers would not be "exploited" until their rates were the highest in Pennsylvania or the Northeast region, then they are mistaken.

The idea that the justness and reasonableness of rates of one utility can be judged by their relationship to rates of other utilities was dismissed long ago by this Court. Like several of the Appellants' arguments in this case, this issue was addressed quite adequately by Justice Harlan in his 1896 opinion in *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578 (1896). As Justice Harlan noted regarding the rates of the public highway in that case:

> If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not re-

quire to be remedied by imposing unjust burdens upon the public.

164 U.S. at 597.

The fact that the rates prescribed for that company were much lower than those allowed for other turnpike companies in the state did not alter that result. As stated by the Court:

> *The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use.* Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. *The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature* when exerting its general powers is that it receive what, under all the circumstances, *is such compensation for the use of its property as will be just both to it and to the public.*

Id. at 598. (Emphasis added.)

Similarly, Justice Harlan wrote in *Smyth v. Ames*, 169 U.S. 466, 547 (1898):

> What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

By contrast, the Appellants' "highest common denominator" approach, under which a utility's rates would

not be deemed exploitative until they were higher than everyone else's, simply disregards the unique and often widely varying costs of service among the utilities of a state or region.

Regardless of one's definition of exploitation, however, the OCA submits that the PUC need not make a specific finding that rates are exploitative in order to remove a non-used and useful plant from rate base.

The whole purpose of rate regulation of public utilities is to prevent exploitation of ratepayers. Without such regulation, monopoly utilities could essentially charge whatever price they could extract from captive ratepayers for needed public utility services. It was in response to this threat of exploitation that Congress and the state legislatures established various methods of rate regulation. *See, e.g., Munn v. Illinois,* 94 U.S. 113 (1876). As stated, for example, by the Supreme Court with respect to the Natural Gas Act in the *Hope* decision:

> The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies.

320 U.S. at 610.

It is through the development and application of ratemaking principles—such as the used and useful principle —that regulators insure that exploitation does not occur. Thus, as stated by the Pennsylvania Supreme Court in the Opinion here under review:

> The "used and useful" principle is soundly based for *it serves to protect consumers from exploitation,* and it comports with the view that, in fairness, con-

> sumers should not be required to buoy up failing utility companies by being required to, in effect, provide public subsidies for utility properties that are not useful in the public service.

Appellants' Appendix at A10. (Emphasis added.)

The OCA submits that it would indeed be exploitative to charge consumers rates which provide not only a substantial return on the utilities' used and useful investments, but also a return on investments which, for one reason or another, are of no use to the ratepayers. It is the essence of exploitation for a utility in a monopoly position to force its ratepayers (who generally have no alternative sources for essential utility services) to pay not only for the full cost of providing utility service to them, but *also* to provide a return on property which is owned by the utility's investors, but which provides no service to the ratepayers.

In sum, the OCA submits that the Appellants are incorrect in arguing that investor interests in a utility's financial integrity must always prevail over ratemaking principles *unless* it is found that the rates requested would exploit ratepayers. Moreover, even if this were the standard, the abandonment of the used and useful principle as proposed by Appellants here would lead to the very kind of exploitation that rate regulation was intended to prevent.

E. The companies' economic arguments against the application of the used and useful principle are misplaced and incorrect.

In stating the basis for this Court's jurisdiction in this case, Appellants acknowledge that "the actions of the PUC

are the equivalent of a statute of Pennsylvania for jurisdictional purposes." Jurisdictional Statement at 3.

Despite this fact, and despite the Appellants' apparent recognition that "the Court's review of State statutes is limited," *id.* at 18, the Appellants have made a number of economic arguments that can only be described as an attempt to have this Court stand in the shoes of the Pennsylvania Public Utility Commission.

For example, the Appellants argue at pages 15-16 of their Jurisdictional Statement that:

> The "used and useful principle" is being increasingly invoked to justify a breach of the implicit and fundamental bargain between investors in the securities of electric utilities and the utilities' customers. It is resulting in the expropriation of millions of dollars of investment with no excuse other than the glib "used and useful" phrase. Assuming that rationality will prevail among investors in the long run, one can anticipate that the cost of electric power will be increased and its availability reduced.

(Footnote omitted.)

This argument, though totally incorrect in the OCA's view, would certainly be relevant to a public utility commission or state legislature in determining whether to adopt the used and useful standard in a particular case or statute. (In Pennsylvania, it should be noted, the used and useful principle has been established both in case law and under the explicit terms of the Commonwealth's Public Utility Code. *See, e.g.*, 66 Pa. Cons. Stat. Ann. §1310 (Purdon 1979), §1315 (Purdon Supp. 1985); *Philadelphia Electric Co. v. Pa. PUC*, 61 Pa. Commonwealth Ct. 325, 433 A.2d

620 (1981); *Bell Telephone Co. of Pennsylvania v. Pa. PUC*, 47 Pa. Commonwealth Ct. 614, 408 A.2d 917 (1979); *Schuykill Valley Lines, Inc. v. Pa. PUC et al.*, 165 Pa. Superior Ct. 393, 68 A.2d 448 (1949).)

To ask this Court to accept this type of argument on appeal, however, is to ask the Court to substitute its economic and policy judgments for those of the Pennsylvania General Assembly and Public Utility Commission. As stated by Justice Black, however, in his Opinion for the Court in *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1962):

> We refuse to sit as a "super legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.

(Footnotes omitted.)

Contrary to the Appellants' arguments here, the OCA submits that the application of the used and useful principle in this case was eminently fair and reasonable. Investors have been—or at least should have been—long aware of the basic principle of public utility regulation in Pennsylvania and throughout the Nation, that they are entitled to earn a return from ratepayers *only* on investment which is used and useful in providing utility service. The

risk that some investments will not produce a return either temporarily or permanently is a risk that has been and continues to be taken by all private investors in public utilities. Moreover, it is a risk for which investors traditionally have been compensated through the allowance of rates of return on utility securities which are higher than the rates of return they would receive from more risk-free investments.

Whether or not the Court agrees with the Appellants' economic theories, however, is clearly beside the point. As stated by Justice Black in *Ferguson v. Skrupa*:

> Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

372 U.S. at 729.

The OCA submits that the utilities' economic arguments are without merit and, in any case, are not dispositive of the constitutional determination in this matter.

CONCLUSION

Two years ago, this Court dismissed, for want of a substantial federal question, the appeal of Jersey Central Power & Light Company on the virtually identical factual and legal issues raised by the Appellants in this proceeding. *Jersey Central Power & Light Co. v. Board of Public Utilities,* 466 U.S. 947 (1984). The similarity in these proceedings is, of course, not a coincidence. The two cases involve the same utility holding company; the same utility plant; and virtually the same legal arguments. Only the

name of the appellant has changed, since the first case involved General Public Utilities' New Jersey operating subsidiary, while the present appeal involves GPU's two Pennsylvania subsidiaries.

It is also not surprising that the New Jersey and Pennsylvania regulatory commissions and courts reached essentially the same results in these proceedings. For many years, the principle that public utilities may only demand a return from ratepayers on investments which are used and useful in the public service has been firmly ingrained in the public utility law of Pennsylvania and New Jersey as well as most of the state and federal regulatory jurisdictions in this Nation. This principle also is consistent with the constitutional requirements enunciated by this Court in *Denver Union Stock Yard,* supra, and serves as the most rational basis for balancing the interests of investors and ratepayers in deciding what level of rates is just and reasonable in a particular case.

Nothing in this Court's opinion in *FPC v. Hope Natural Gas* provides support for Appellants' assertion that the constitutional rights of investors have been violated in this case. Whether or not the rate increase requested by the utilities would be deemed "exploitative," the *Hope* opinion provides the utilities with no right—constitutional or otherwise—to demand a return from ratepayers on property which provides no utility service.

The legal arguments raised by Appellants in this case are without merit, and the economic arguments are not only flawed, but would invoke a standard of substantive due process review of state legislative policies that was abandoned by this Court several decades ago.

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Argument

In light of this Court's dismissal of the virtually identical appeal two years ago, and for the reasons set forth above, the Pennsylvania Office Consumer Advocate respectfully urges this Honorable Court to dismiss this appeal of Metropolitan Edison Company and Pennsylvania Electric Company. Alternatively, it is requested that this Court affirm the December 9, 1985, Opinion of the Pennsylvania Supreme Court below.

Respectfully submitted,

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